STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals
Honorable Richard A. Bandstra
Honorable Michael J. Talbot
Honorable Bill Schuette

SHEILA WOODMAN, as Next Friend of
TRENT WOODMAN, a minor,

Plaintiff-Appellee,

v.

KERA, LLC, a Michigan corporation,
d/b/a BOUNCE PARTY,

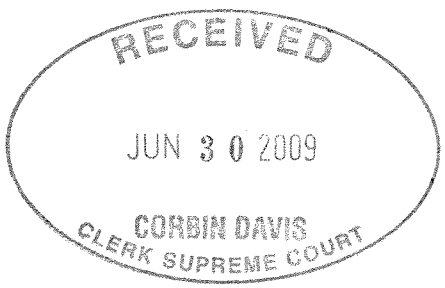
Defendant-Appellant.

Supreme Court No. 137347
Court of Appeals No. 275079
Lower Court Case No. 06-00802-NO

DEFENDANT/APPELLANT KERA, LLC'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE



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STATEMENT OF QUESTIONS PRESENTED

I. **ARE PRE-INJURY LIABILITY WAIVERS VALID AND ENFORCEABLE?**

Plaintiff/-Appellee says ..... "No"

Defendant-Appellant says ..... "Yes"

The Trial Court said ..... "Yes"

The Court of Appeals said ..... "No"

A. SHOULD PARENTS BE FREE TO CONTRACT AS THEY SEE FIT FOR THE BENEFIT OF THEIR CHILDREN, WITHOUT INTERFERENCE FROM THE COURT?

Plaintiff/-Appellee says ..... "No"

Defendant-Appellant says ..... "Yes"

The Trial Court said ..... "Yes"

The Court of Appeals said ..... "No"

B. SHOULD THE COURT INTERJECT ITSELF AND RENDER SUCH AN AGREEMENT INVALID, BASED UPON ITS OWN VALUE JUDGMENTS WHEN DECIDING WHETHER SUCH LIABILITY WAIVERS ARE OR ARE NOT IN THE BEST INTERESTS OF THIS STATE, RATHER THAN LEAVING SUCH POLICY DECISIONS TO BE MADE BY THE LEGISLATURE?

Plaintiff/-Appellee says ..... "Yes"

Defendant-Appellant says ..... "No"

The Trial Court said ..... "No"

The Court of Appeals said ..... "Yes"

C. DOES LONG-STANDING MICHIGAN LAW RECOGNIZE AND UPHOLD PRE-INJURY LIABILITY WAIVERS?

Plaintiff/-Appellee says ..... "No"

Defendant-Appellant says ..... "Yes"

The Trial Court said ..... "Yes"

The Court of Appeals said ..... "No"

D. HAVE MORE REASONED DECISIONS FROM OTHER STATES UPHELD SUCH PRE-INJURY LIABILITY WAIVERS SIGNED ON BEHALF OF MINORS?

Plaintiff/-Appellee says ..... "No"

Defendant-Appellant says ..... "Yes"

The Trial Court said ..... "Yes"

The Court of Appeals said ..... "No"

JUDGMENT OR ORDER APPEALED FROM

Pursuant to MCR 7.306, Defendant-Appellant, KERA, LLC d/b/a BOUNCE PARTY, LLC files this Brief on Appeal pursuant to this Honorable Court's granting Defendant-Appellant's Application for Leave to Appeal, dated May 7, 2009.

Defendant-Appellant KERA, LLC d/b/a BOUNCE PARTY, LLC, respectfully requests that this Honorable Court reverse the Court of Appeals' decision holding that the liability waiver was invalid, enforce the liability waiver and order that summary disposition be granted to the Defendant-appellant, KERA, LLC d/b/a BOUNCE PARTY, LLC, based upon that liability waiver.

CONCISE STATEMENT OF FACTS AND PROCEEDINGS BELOW

Defendant-Appellant KERA, LLC d/b/a BOUNCE PARTY (hereinafter referred to as "Bounce Party") files this Brief on Appeal following an August 12, 2008 published opinion issued by the Michigan Court of Appeals which reversed the opinion and order of the trial court (see Appendix pp, 11a–28a, copy of Court of Appeals opinion). The trial court held that plaintiff's negligence claim should be dismissed because of a pre-injury waiver signed by the minor's father (see Appendix, pp 9a-10a, copy of the trial court's order on the motions for summary disposition, as well as a copy of the trial court's opinion and order denying plaintiff's motion for reconsideration). The Defendant Bounce Party is a facility housing inflatable playground equipment for the use of children and adults. There are bouncing areas (sometimes referred to as "Moonwalks"), a jousting pit and a slide.

The five year old plaintiff minor (hereinafter referred to as "minor"), jumped from the top of the slide, landed with his leg twisted underneath him, and broke his leg. Warnings, both written and oral, were given to all participants, specifically warning them not to jump from the slide. The minor's rather, Jeffrey Woodman (hereinafter referred to as "the father") was either at the top of the slide with the minor (as testified to by the minor) or was at the foot of the slide watching the minor (as testified to by the father).

The father signed a waiver of liability waiving all claims against the Bounce Party, prior to the time that the minor began playing on the equipment.

The trial court held that the waiver of liability was valid. The Court of Appeals reversed the trial court's ruling on the validity of the waiver. The Court of Appeals held that pre-injury waivers signed by parents on behalf of minor children are invalid (see Appendix, pp 25a. The Court weighed various societal interests in upholding the validity of such waivers versus the societal interests in invalidating such waivers. Despite the clear agreement of the parties, the

Court of Appeals decided that court intervention was necessary and proper to strike down the contract that was entered into.

The Court of Appeals recognized that its decision "is found to have enormous consequence and profound impact throughout Michigan." (Appendix, p 35a). The impact that this case will have is huge; those with children all know that signing waivers, release and permission slips allowing our children to participate in fun and recreational activities are commonplace. The case involves "several issues of extreme legal and policy significance that should be addressed as a consequence of this decision" (Appendix, p 33a, concurring opinion, Judge Schuette). Judge Bandstra found that he was constrained to join in the opinion of the Court invalidating such waivers, however, Judge Bandstra indicated that "I think that result is wrong and write separately hoping that either the Michigan Legislature or our Supreme Court will further address the issue" (Appendix, p 29a). Thus, at least two judges on the Court of Appeals expressed reservations about invalidating such pre-injury waivers, however, the judges felt that they had no other choice, given prior statements from this Court.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

For purposes of this appeal, below, Bounce Party accepts as true all testimony given by the plaintiff, the minor and the father. Attached hereto as Defendant's Appendix pp 44a-49a are relevant pages from the deposition transcript of the minor. Attached as Appendix, pp 50a-63a are the relevant pages from the deposition transcript of plaintiff Sheila Woodman, the minor's mother. Attached as Appendix, pp 64a–83a are the relevant pages from the deposition transcript of the father.

The Bounce Party contains two rooms with inflatable play equipment. There are various pieces of play equipment located at the Bounce Party. There is an area where people can bounce up and down on an inflated floor. These are oftentimes put up outside in backyards or at fairs and are sometimes referred to as "Moon Walks." There is also other inflatable equipment, such as a jousting pit and the slide where the plaintiff was injured. Attached as defendant's Appendix, pp 85a-89a are photographs taken by the defendant of various equipment and signs in the center. In addition, the plaintiff, in response to document requests, has produced some (but not all) photographs taken on the day of the accident, prior to the accident. Those photographs are attached as defendant's Appendix, pp 90-91. In Appendix 90a, the minor is the child sitting on the far right in the picture and the father is the adult male bending over behind him. In the second picture, the father is standing at the top of the stairs to the slide speaking to one of the other adults who attended the party. (Appendix, p 91a).

Customers can use the Bounce Party in an "open bounce" where people can simply pay to use the facilities, or customers can rent out the Bounce Party for a party or function. On the day in question, the plaintiffs had rented out the facility for the minor's 5th birthday party. There are two large playrooms. The party first gathers in the lobby where a safety talk is given. The party then goes into the first playroom, followed by the second playroom. The party then, at its option, can go into another room where they can enjoy pizza and/or cake.

Significantly, prior to the time that any customer is allowed to use the facilities, a waiver of liability must be signed. Attached hereto as defendant's Appendix, p 92a is the waiver of liability signed by the father on behalf of the minor.

The waiver was part of an invitation to the party. The invitation and release read as follows:

_____ has been invited to a _____ party

for _____.

The party will be held at **Bounce Party**

on _____, _____ from _____ to _____.

Please RSVP at _____ before _____.

We are hosting our party at Bounce Party in Kentwood. We will have chaperon[e]s present to ensure that this is a safe and enjoyable party. We need a parent/guardian to review and sign the information below and send it with your child on party day. Please have your child at Bounce Party 15 minutes before the party start time.

Thank you, _____

Your host

Bounce party is an indoor inflatable play arena with interactive inflatables. Your child may have the opportunity to bounce, slide, maneuver mazes, run challenge courses, bouncy box, bungee basketball and joust. Your hosts will have chaperon[e]s on site and we will have staff members present. To ensure a safe and enjoyable party please be sure your child follows these few simple rules prior to attending the party.

◊ Please RSVP to your host. We really hope you will be able to attend the party.

◊ Wear CLEAN socks. No shoes or bare feet are allowed in the play area.

◊ Wear comfortable clothes.

◊ Leave all jewelry, sharp objects, keys, hair bands, pencils, watches, etc. at home.

◊ Let your child know that good manners are expected and inappropriate behavior will result in removal.

◊ Be sure that the parent/legal guardian of the gues signs this release and the guest brings it with them to the party. Anyone without parent/guardian approval will not be able to participate in the arena games. If you have multiple guests in your family, you can list all their names on this one form.

THE UNDERSIGNED, by his/her signature herein affixed does acknowledge that any physical activities involve some element of personal risk and that, accordingly, in consideration for the undersigned waiving his/her claim against BOUNCE PARTY, and their agents, the undersigned will be allowed to participate in any of the physical activities.

By engaging in this activity, the undersigned acknowledges that he/she assumes the element of inherent risk, in consideration for being allowed to engage in the activity, agrees to indemnify and hold BOUNCE PARTY, and their agents, harmless from any liability for personal injury, property damage or wrongful death caused by participation in this activity. Further, the undersigned agrees to indemnify and hold BOUNCE PARTY, and their agents, harmless from any and all costs incurred including, but not limited to, actual attorney's fees that BOUNCE PARTY, and their agents, may suffer by an action or claim brought against it by anyone as a result of the undersigned's use of such facility.

Participant: _____ Signature: _____
Printed Name
Parent or Legal Guardian's signature if participate [sic} is under age 18.

Date: _____

BE SURE YOU COMPLETE THIS CARD AND SEND IT WITH THE PARTY GUEST!

The mother reserved the Bounce Party on September 19, 2004 for the birthday party. That occurred weeks prior to the party. The Bounce Party then sent numerous waivers of liability and invitations to the party to the mother, who was renting the facility. These waivers of liability and invitations were then set to the guests who were going to attend the party, so that everyone using the facilities will have an ample opportunity to read and understand the waiver that must be signed. The mother testified at her deposition that they had ample time, in fact, weeks, to read the liability waiver (Appendix, pp 62a-63a).

The mother made the arrangements for renting the facility. The father had not done anything with respect to the party, other than "showing up". When they arrived at the Bounce Party that day, his wife handed him the waiver and told him that he needed to sign it so that they could play. The father, therefore, signed the waiver of liability at the facility (Appendix, p 66a). The father chose not to read the waiver before he signed it (Appendix, p 68a). Although the family had the waiver weeks prior to the party, he never reviewed it before he signed it (Appendix, p 66a). He simply filled out the form and signed the waiver of liability without making any attempt to read what he was signing (Appendix, pp 66-70). He then handed it to an

employee (Appendix, p 67a). He never discussed the liability waiver with his wife and never asked her whether she had read it (Appendix, p 71a).

The father admitted that no one pressured him into signing the waiver of liability (Appendix, p 81a). No one tricked him, coerced him or told him that he had to sign the liability waiver (Appendix, p 82a). No one promised him anything to induce him to sign the liability waiver (Appendix, pp 82a-83a). The father is not aware of any misrepresentation, fraud or overreaching on the part of the defendant (Appendix, pp 82a-83a). He was not under the influence of alcohol or drugs and was not dazed or in shock at the time that he signed the liability waiver (Appendix, p 82). Similarly, the mother admitted that neither she nor her husband were dazed, confused, under the influence or tricked into signing the waiver (Appendix, pp 62a-63a). She admitted she knows of no misrepresentations made by the defendant (Appendix 4, p 63a).

The father reads and writes the English language. He graduated from high school and completed approximately 60 credits in college (Appendix, p 65a). The mother has a bachelor of science degree, along with a master's degree, and works as a schoolteacher (Appendix, pp 51a, 54a-55a). Thus, there can be no doubt but that the father could have read and understood the waiver of liability, had he bothered to read it.

The mother and the minor had been to the Bounce Party on one prior occasion (Appendix, pp 53a-54a). They had a good time and wanted to come back. The minor had been using the slide in question a few minutes prior to the accident, on the date of the accident. In fact, he testified that the accident occurred on his fifth time down the slide (Appendix, p 45a). He admitted that he went down the slide four times prior to the accident without incident (Appendix, p 45a).

Significantly, the minor admitted that he jumped off of the slide (Appendix, pp 46a-47a. His leg was twisted toward the back when he jumped (Appendix, pp 46a-47a). He

then put his right leg (which was the leg that was broken) back when he was in mid-air (Appendix, p 48a). He then landed awkwardly, with his right leg underneath him.

The father was with the minor at all times that day on the slide (Appendix, pp 90a-91a) contains photographs showing the father on the top of the slide with the minor, just minutes before the accident, Appendix, pp 76-77). In addition, other adults were using the slide with their children and were also standing around the playroom supervising the children (Appendix, p 78a). The father admitted that he was the adult closest to the minor at the time of the accident and he had just been up on the slide with the child (Appendix, p 84a). According to the minor, the father was at the top of the slide with him at the time that he jumped (Appendix, p 46a). He remembers his father coming down the steps of the slide after his accident (Appendix, p 49a). His mother was at the bottom of the slide at the time that he jumped (Appendix, p 49a). According to the father, he was standing, on the slide, but at the bottom of the slide at the time of the accident (Appendix, p 80a).

The Bounce Party had an employee supervising in the playroom at the time. In addition, the Bounce Party required that any party that rented the facilities have at least one adult for every 8 children. Although the plaintiffs alleged in their complaint that there was a lack of adult supervision, the father admitted, after defense counsel went through all of the people who were at the party, that there were, in fact, 12 adults and 15 kids at the party (Appendix, p 72a). In other words, there was a ratio of three adults for every four children (Appendix, p 72a). That testimony was confirmed by the mother (Appendix, p 59a).

The mother and father admitted that an employee gave a talk to all members of the party, prior to the time that there were allowed to play (Appendix, pp 73a-74a). The most important directive given by the Bounce Party employees is not to jump from the top of the slide. The employee goes through the safety rules which have been prominently placed on the wall of the lobby. A picture of the posted safety rules is contained on Appendix p 86a. An employee

read each of those rules, in order, so that customers are very familiar with them. As can be seen, the fourth directive from the top states "no jumping from the top of slides/events." The second directive states "slide feet first only."

Unfortunately, the parents did not pay attention to the safety talk (Appendix, p 61a, Appendix, p 75a). Unfortunately, neither parent read the safety rules posted on the wall, either (Appendix, p 75a, Appendix, p 61a). In addition to being told orally not to jump from the slide, and in addition to being warned to not jump from the slide by the large safety rules posted on the wall, there are also rules for participation on the slide directly on the slide near the entrance. Rule No. 6 states that participants must slide "feet first, face up, in a sitting position." (Appendix, 86a). That warning was not read by the Woodmans, either.

The plaintiffs argued below that the defendant did not follow the manufacturer's instructional manual that stated that an attendant should supervise and that slide mats should be used. Such arguments are nothing more than red herrings. If the father could not have stopped the minor from jumping, when he was right on the slide, certainly an employee would not have been able to stop such misbehavior. There were 12 adults in the room. The plaintiff minor would have jumped whether he had a slide mat or whether he did not. Plaintiffs will probably argue that the Bounce Party put netting on the slide after the accident. Although that is clearly a subsequent remedial measure and not admissible as evidence, the netting is used to keep the slide cool, since it is usually used outside. It is not a safety device. The defendants put the netting on simply in an attempt to dissuade another customer from jumping off the top of the slide. It certainly was not a recommended or required safety device.

In fact, the father admitted that he never gave instructions to the plaintiff minor on how to use the slide (Appendix, p 79a). As noted, the mother is an elementary school teacher. Although there were 12 adults and 15 children at the party in question, she admitted that at the playground at her school, there are only 4 adult supervisors watching over 100 children

(Appendix, pp 54a-55a). Accordingly, at the mother's school there is a ratio of less than 4 adults for every 100 children. Nevertheless, she claims that the Bounce Party did not have enough adult supervision to prevent her son from jumping. The mother claims that if the Bounce Party had assigned an employee to, at all times the Bounce Party was open, simply sit at the top of the slide, then this employee may have been able to somehow have seen that the plaintiff was going to jump and somehow may have prevented him from doing so (Appendix, p 60a). Despite that, she admitted that no adults are assigned to sit at the top of the slide on the playground at her school (Appendix, pp 55a-56a). She was then asked whether she will be at fault or negligent if one of her students jumped off a slide. She refused to answer the question (Appendix, pp 57-58).

The Trial Court held that the waiver of liability was valid. The Court, therefore, held that summary disposition should be granted on the plaintiffs' claim of ordinary negligence. (Appendix, pp 9a-9b).

The Court of Appeals reversed and held that the pre-injury waiver signed by the father was invalid.

The ruling in this case will have profound implications for providers of services, coaches, instructors, businesses, camps, training facilities and other entities that provide services, facilities and opportunities to children across the state. Nevertheless, after the significant and profound legal issues are set aside, what this case really amounts to is an active young man misbehaving who jumped off the top of a slide and broke his leg. As Judge Bandstra pointed out in his concurring opinion, kids have jumped off the top of the slide for generations and will undoubtedly continue to jump off of the top of slides for generations to come. We have all, as children, probably done stupid things. Waivers such as this protect a business owner from claims of ordinary negligence.

For the reasons that follow, defendant-appellant KERA, LLC, d/b/a BOUNCE PARTY, respectfully requests that this Honorable Court reverse the Court of Appeals and hold that such liability waivers are valid and enforceable

ARGUMENT

I. PRE-INJURY LIABILITY WAIVERS ARE VALID AND ENFORCEABLE.

A. Parents Should Be Free to Contract as They See Fit for the Benefit of Their Children Without Interference from the Courts.

The issue before this Court is whether a parent under Michigan law may sign a binding, pre-injury release on behalf of his minor child in order to allow the minor to participate in an activity in a commercial setting. For generations, parents and their children, together, have enjoyed activities which, inevitably, involve some risk. Such activities are numerous and extensive. In fact, Judge Schuette, in his concurring opinion, attached an appendix with numerous examples of different types of pre-injury, parental waivers, which demonstrate their "wide-spread use." Although such activities would be too numerous to mention, some examples would include sports camps, summer camps, horseback riding activities, dance instruction, swimming instruction, weight lifting, work out gyms/facilities, acting/singing lessons, bowling, boating, hunting camps/instruction, skiing, snowmobile instruction, private cheerleading instruction/camps, water parks, archery, camping/campgrounds, etc. The potential ramifications on different activities and businesses resulting from the Court of Appeals opinion are, needless to say, substantial and endless.

As a result of our litigious environment, those who provide these opportunities to children and families have been unable to secure insurance without the parents signing such liability waivers. If this Honorable Court should deny Bounce Party's Application for Leave to Appeal, so that the law in this state would be that such liability waivers are unenforceable, it will have a devastating effect on the availability of such activities and opportunities.

Thousands of small "mom and pop" businesses, such as the Bounce Party in the instant case, will cease to exist. Many educational and recreational activities will be lost and will become unavailable for the children of this state.

Indeed, the business in question, the Bounce Party, is a prime example. The Pero family opened the business. Mr. and Mrs. Pero, along with their two children, worked at the facility. It was a family run business. According to Mr. Pero, he prepared the liability waiver himself, because he was told that he would need to do so by his insurance agent in order to procure insurance.

We all know that children are precocious and that children do stupid and crazy things. As Judge Bandstra noted, kids for generations have been jumping off of the top of slides. Kids have been jumping from swings. Kids have been playing with matches and fire. Kids have been riding their bicycles in a dangerous manner, such as going over ramps, riding "no-handed", "popping wheelies", etc. No matter what is done, kids have and kids will continue to do things that may not be in their physical best interests.

Despite that, as Judge Bandstra noted, more and more lawsuits are being filed after a child sustains such an unfortunate injury. It is precisely for this reason that liability waivers have been used by Bounce Party and thousands of other providers of services to children across the state and across the country. As is amply demonstrated by the instant case, no matter what is done, even if a parent is with the child, children will do things that an adult might recognize as being unsafe.

The Court of Appeals wrote extensively about "protecting the rights of minor children" (Appendix, p 24a). To the contrary, defendant maintains that, in fact, upholding the validity of such pre-injury waivers is, in the long run, in the best interests of our children. After an injury occurs, of course, it is the parent who decides whether an attorney should be sought and whether litigation should ensue. As such, the parents will make the decision as to whether the

minor will be a party to a lawsuit. It is the parents who will decide whether the minor will become a litigant in order to sue another party.

Consequently, if our legal system confers upon the parents the right to make a decision as to whether the minor will or will not file suit, then it should also be the parents' decision to waive the minor's right to file such suit. Indeed, many parents, faced with a similar circumstance, may reasonably choose not to subject their child to litigation. This is the type of decision in which reasonable parents may differ. In the absence of any abuse, however, it is the parents who should decide what activities their child will participate in, whether a waiver should be signed so that their children can participate in such activities and whether a lawsuit should be instituted on behalf of their child.

The Court of Appeals recognized that parents have inherent rights and fundamental authority under the Fourteenth Amendment of the United States Constitution to make determinations on behalf of their children. The Court of Appeals also recognized that the United States Supreme Court has held that there is a "fundamental right of parents to make decisions pertaining to the care, custody and control of their minor children" (Appendix, p 16a). In *Parham v J R*, 442 US 584, 602; 99 S Ct 2493; 61 L Ed 2d 101 (1979), the U.S. Supreme Court noted the following:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has been recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham, at 602.

The United States Supreme Court has also held that there is a constitutional right for parents to make decisions involving their children. In *Troxel v Granville*, 530 US 57; 120 S Ct 2050; 147 L Ed 2d 49 (2002), the Court held that "the due process clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care,

custody, and control of their children." *Troxel, supra*, at 66. The Court explained in *Troxel* that "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel, supra*, at 68-69. Not only does the Constitution protect the rights of parents, but the Supreme Court in *Troxel* also warned that the state (through the courts) should not intrude on the relationship between parent and child. "**[T]he due process clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made.**" *Troxel, supra*, at 72-73 (emphasis supplied).

Not only is it a fundamental right secured by the United States Constitution, but it is a principle recognized across the world. The state (through the courts) should not intrude when a parent is making a "judgment call" as to what are in the best interests of his children. The Court of Appeals recognized as much, when it stated the following:

> Historically, this is consistent with rulings by the Court indicating that the inherent nature of parenthood is comprised of the companionship of a child and the right to make decisions pertaining to the child's care, control, health, education, religious affiliations and associations. See *Pierce v Society of Sisters*, 268 US 510, 534-535; 45 S Ct 571; 69 L Ed 1070 (1925); *Meyer v Nebraska*, 262 US 390, 399; 43 S Ct 625; 67 L Ed 1042 (1923).
>
> Some jurisdictions have used these precepts regarding the dominance of parental authority to validate pre-injury waivers to preclude liability.

Appendix, p 17a.

Pre-injury waivers such as this are agreements made by parents in order to allow their children to receive the benefits offered by the defendant, be they recreational, educational or otherwise. The Supreme Court has held that the Fourteenth Amendment due process clause protects such rights. The courts should be extremely reluctant to intervene and invalidate the parent's decision with respect to their children, by rendering such agreements null and void, as

the Court of Appeals did in the instant case. The constitutional protections provided to parents under the Fourteenth Amendment should not be abrogated because a state court believes that in the interests of some public policy, constitutionally protected parental decisions should be questioned and nullified because "the court knows better." Indeed, such intrusions by interventionist courts into the parent/child relationship are disturbing.

Parents must be left to decide what their child should be allowed to participate in. Parents understand, better than the courts, the maturity level of their child, how their child behaves, the knowledge that their child possesses, etc. Almost any activity will involve some risk. Decisions are individual and must be based upon the circumstances of each family. The parents' choice should not be ignored. It should be given the same effect as a parent's decision as to what school the child attends, what medical treatment the child should have and what type of religious training and education should be provided to the child.

The strength of families and the value of parental decision making is a fundamental principle of this state and this country. The Court of Appeals opinion, if it is allowed to stand, encroaches on that fundamental principle. Not only does the Court of Appeals opinion intrude on that principle, but it also intrudes on the fundamental principle of freedom of contract. There is no argument in the instant case that defendant committed fraud, that the father was tricked into signing the waiver or that there was any ambiguity in the waiver.

The distinction made between a "for profit" entity and a "not for profit" entity makes no sense. Too often businesses are criticized for making a profit, even if they offer valuable services to the community. There are many businesses that make a profit and provide valuable services to children at the same time. Such businesses are too numerous to include them all, but they include sports camps, cheerleading camps, fishing charters, boat/canoe rentals, exercise facilities, sports facilities, dance studios/instruction, travel companies, etc. A court should not substitute its value judgment that a "for profit" business should not have the benefit of

such a liability waiver, but a "not for profit" business will enjoy the benefit of being able to enforce such a waiver.

Certainly, should this Court hold that such liability waivers are unenforceable, then that could affect a charitable organization or someone volunteering their time. It could very well have a deleterious effect on non-profit businesses. On the other hand, "for profit" businesses also provide a valuable service to the community. There are many activities that children enjoy that are provided by profit making entities. Profit making entities provide jobs and pay taxes to help support the community. If such waivers are deemed invalid, the cost of doing business will exponentially rise either because of the threat of such lawsuits or because of the increased insurance premiums that will be paid. Given this state's economic situation, the courts should be doing anything possible to help such businesses, rather than to raise the cost for these entities to conduct business in Michigan.

The contract issue is similar to the issue addressed by this Court in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2D 776 (2004), when this Court overturned the "reasonable expectations" doctrine in the area of insurance law. Under such an approach, which is used in other states, the courts interpret a contract so as to effectuate the "reasonable expectations" of the parties. In other words, if the "reasonable expectation" of the insured is inconsistent with the clear language of the contract, under the "reasonable expectations" doctrine, the clear language of the contract would be amended or altered by the court so that it would be consistent with the "reasonable expectations" of the insured.

Under that doctrine, interventionist courts invalidate contractual provisions and, instead, rewrite the contract in a manner that the court deems fair and just. This is judicial activism at its worst. Under this principle, the courts will simply "throw out" a contract and, based upon the court's superior knowledge and wisdom, will rewrite the contract for the parties.

This Court has recognized that such policy decisions are best left for the Legislature. This Court has repeatedly held that, absent some unusual circumstance, the public policy of this state, in fact, favors enforcement of contracts as written. In *Wilkie, supra*, this Court held that an insurance contract should be enforced as written. This Court stated:

> This approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the **bedrock principle of American contract law that parties are free to contract as they see fit and the courts are to enforce the agreement as written** absent some highly unusual circumstance, such as a contract in violation of law or public policy. This Court recently discussed, and reinforced its fidelity to this understanding of contract law in *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002). The notion, that free men and women may reach agreements regarding their affairs without government interference and courts will enforce those agreements, is ancient and irrefutable. They draw strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, Article I, §10, 1.
>
> ***
>
> In contrast to this legal pedigree extending over the centuries, the rule of reasonable expectations is of recent origin. Moreover, it is antagonistic to this understanding of the rule of law and is, accordingly, in our view, invalid as an approach to contract interpretation.

Wilkie, at 51-52 (emphasis supplied).

This Court's decision in *Wilkie* teaches that contracts should be enforced as written. This Court has rejected attempts by prior courts to rewrite or invalidate contracts based upon a policy judgment by the court as to wether such contracts were "fair" or in the bests interests of the parties. This was a clear contract that was agreed to by the parties. The father agreed to waive any claims for negligence in exchange for the Bounce Party allowing his son to use the play equipment on the premises of the Bounce Party. The contract should be enforced as written.

B. The Court Should Not Interject Itself and Render Such An Agreement Invalid, Based Upon Its Own Value Judgments When Deciding Whether Such Liability Waivers Are or Are Not In the Best Interests of This State; This Is the Type of Policy Decision That Should Be Made by the Legislature, Not the Courts.

Any parent with young children knows that permission slips and liability waivers are commonplace. For the Court to now hold that parents no longer have the authority to enter into such agreements, as the Court of Appeals did, would be to reshape not only the law but it would also reshape what opportunities are given to children in this state.

Although recognizing that the Michigan Legislature was the proper entity to address these policy concerns, the Court of Appeals, nevertheless, after an extensive review of the competing public policy interests, invalidated the otherwise valid contract on the basis of public policy. The Court of Appeals acknowledged that "[t]he Michigan Legislature is the proper institution in which to make such public policy determinations, not the courts." (Appendix, p 24a citing *Huron Ridge LP v Ypsilanti Twp*, 275 Mich App 23, 45; 737 NW2d 187 (2007)). Despite acknowledging that basic precept, the Court of Appeals then ignored its own admonition and threw out the agreement, which was otherwise valid, based upon the court's opinion on what would be the best policy for the state of Michigan.

Judge Bandstra, in his concurrence, reluctantly concurred because, in his opinion, he was bound to do so according to a statement issued by this Court in *McKinstry v Valley OB-Gyn,* 428 Mich 167, 192; 405 NW2d 88 (1987). Although he acknowledged that there was no Michigan precedent explicitly holding whether pre-injury waivers were valid, he considered a reference that this Court made in *McKinstry* that a parent had no authority to waive, release or compromise claims by his child, to be binding. On the one hand, Judge Bandstra indicated that there was no precedent, but then felt constrained by this Court's statement in *McKinstry*. That will be analyzed in Section "C" of this brief.

Although he felt constrained to join in the majority, Judge Bandstra disagreed with the public policy rationale advanced by Judge Talbot, writing for the Court. He specifically states that "I think the result is wrong and writes separately hoping that either the Michigan Legislature or our Supreme Court will further address the issue." Appendix, p 29a of Judge Bandstra's concurring opinion.

Judge Bandstra recognized the difference between a holding that post injury waivers were invalid and then applying that rule to pre-injury waivers. The cases in Michigan cited by the plaintiff apply to post injury waivers. There have been legitimate concerns expressed by the courts in post injury waiver cases, since the courts want to protect an injured child from being taken advantage of by a parent who may be attempting to obtain money obtained in a settlement or judgment arising out of a child's injury.

Indeed, the Legislature has passed statutes and there are court rules to protect children in a post injury setting. MCL 700.5102 protects children if they are paid more than $5,000. MCR 2.420 provides specific rules which must be followed in the event that there is a settlement or judgment in favor of a minor. This reflects a recognition by the Legislature and the Court that when there is money that may be paid or payable to a minor, the minor must be protected. Section 700.5102 specifically mandates that an individual receiving money or property for a minor must use the money for the minor's support and education and must not pay himself any of that money. Those are the types of concerns that the courts have recognized in the post injury situation, when "money is in the air."

The Legislature recognized, as a matter of pubic policy, that minors must be protected, by way of statute, in the post injury setting when money may be due and owing to the minor. The Legislature, of course, could have passed a statute with respect to the validity of pre-injury waivers. The Legislature chose not to do so. This Court should not usurp the power of the

Legislature by, in effect, crafting a new rule in which the court creates the law instead of doing what the court should do, that is, interpret the law.

Judge Bandstra recognized the difference between pre-injury and post-injury waivers. Judge Bandstra cited the following passage from a legal commentator summarizing why the concerns present with a post-injury waivers are not the same when dealing with a pre-injury waiver case:

> The concerns underlying the judiciary's reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim. A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests.
>
> A parent who signs a release before her child participates in a recreational activity, however, faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign a release.
>
> A parent who dishonestly or maliciously signs a pre-injury release in deliberate derogation of his child's best interests also seems unlikely. Presumably parents sign future releases to enable their children to participate in activities that the parents and children believe will be fun or educational. Common sense suggests that while a parent might misjudge or act carelessly in signing a release, he would have no reason to sign with malice afore-thought.
>
> Moreover, **parents are less vulnerable to coercion and fraud in a pre-injury setting. A parent who contemplates signing a release as a prerequisite to her child's participation in some activity faces none of the emotional trauma and financial pressures that may arise with an existing claim.** That parent has time to examine the release, consider its terms and explore possible alternatives. A parent signing a future release is thus more able to reasonably assess the possible consequences of waiving the right to sue.

Zivich v Mentor Soccer Club, Inc, 82 Ohio St. 3d. 367, 696 NE2d 201, 206-207 (Ohio, 1998) quoting Note *Scott v Pacific West Mountain Resort: Erroneously Invalidating Parental Releases of a Minor's Future Claim*, 68 Wash L R 457, 474 (1993) (emphasis supplied).

Judge Bandstra, rightfully, agreed with the above analysis. Judge Bandstra noted that "]t]hese considerations are persuasive and **I conclude that, whatever the merits of abrogating post-injury parental waivers, there is no reason to extend that abrogation to pre-injury waivers.**" Appendix "A", p 31a of Judge Bandstra's concurrence.

Judge Bandstra also recognized that it is parents, rather than the courts, who should make such decisions for their children. In addition, the concurring opinions in the Court of Appeals also recognized the "significant and far-reaching implications" the Court of Appeals decision has (Appendix, p 31a, Judge Bandstra's concurrence). Judge Bandstra stated:

> As this case amply demonstrates, ours is an extremely and increasingly litigious society. Any entity that provides an educational, recreational or entertainment opportunity to a minor does so at great risk of having to defend an expensive lawsuit, meritorious or not. To avoid some of that, pre-injury waivers have become commonplace. If the law does not honor those waivers, the implications appear inevitable: the cost of providing opportunities will rise, some families who would like their children to participate will no longer be able to afford to and, ultimately, some opportunities will simply become unavailable altogether.

Appendix 31a, Judge Bandstra's concurrence. (footnotes omitted).

Judge Schuette, in his concurrence, also recognized the "enormous consequence and profound impact throughout Michigan" the Court of Appeals decision will have. (Appendix, p 35a, Judge Schuette's concurrence). Judge Schuette recognized the number of youth activities that used waivers, releases and permission slips. In fact, Judge Schuette attached many such waivers, which were not in the record, to his concurring opinion.

When deciding whether to execute or to not execute such a liability waiver, and when deciding whether to allow a minor to participate in activities, involves a conscious choice on the part of a parent. Almost any activity will involve some risk, particularly when children are

involved since children may not recognize a risk and may not take proper action when engaged in activities that pose some risk of being harmful. These are the type of proper parental choices that must be made by a parent. A parent's decision in such matters should not be ignored. The courts should not be substituting their judgment for the judgment of reasonable and well-meaning parents.

Such decisions should be given the same effect as a parent's choice as to what school a child attends, what medical treatment the child should have, or what type of religious training and education should be provided to the child. Any concern that a child should be protected from making imprudent decisions, because of his young age, is not involved in such a circumstance. The father signed the release. It is the parent making the decision. Parents having the authority to enter contracts and to assume liability for their children is a fundamental value of this country that should be encroached. "Parents normally have the duty and authority to act in furtherance of both the physical and legal needs of their minor children. This responsibility includes deciding whether the minor will undergo medical treatment, deciding what school the minor will attend, **signing contracts for or on behalf of the minor**, and assisting the minor in deciding whether to waive Miranda rights." *People v Abraham,* 234 Mich App 640, 599 NW2d 736 (1999) (emphasis supplied).

The Court of Appeals emphasized its concern for the welfare of children. Defendant maintains, however, that the welfare of children is not protected by invalidating such waivers. Money is not going to make the minor's broken leg less painful. It will, instead, reward the child for his own misbehavior. Moreover, such appellate decisions have a societal impact in that they teach children that they have no responsibility for their own conduct. If a child misbehaves at home or in school, and receives a reward for that misbehavior, that misbehavior will continue or get worse. If it is the policy of this state to reward children who misbehave (i.e., receiving money by way of a lawsuit), that misbehavior, at a societal level, will continue or get worse. The courts

should not intervene based upon their own perception of what may be beneficial to the child and create a legal remedy for such an injury.

If a parent decides that, in exchange for allowing his child to participate in an activity, he was going to waive a potential lawsuit, then that decision should not be intruded upon by the court. Not every injury should be actionable in a court of law. Not every injury is compensable. We have all had injuries as children. Oftentimes, we, as children, did stupid things which caused our injury. Despite the pain of an injury, a child will learn valuable lessons from such injuries. In fact, such an injury may actually benefit the child in the long run. Injuries cause children to be more cautious. Perhaps, as a result of sustaining an injury as a child, the child will, in the future, be more cautious and may avoid a more serious injury.

Litigation sends exactly the opposite message. Instead of learning a valuable life lesson, which may actually benefit the child, the child, by being a party to litigation, hears that he did nothing wrong in causing the injury. In the instant case, the child will hear from his parents and his attorney that he did nothing wrong by jumping from the top of the slide. Rather, he will hear that it was the fault of the defendant for not protecting him. As a matter of policy, the court should not be used as a tool in reflecting fault for one's own misconduct, absent some legislative direction expressed by statute. Again, this is the type of policy decision that should be weighed by the Legislature, and not by the courts.

Defendant maintains that the Court of Appeal's interventional act of invalidating pre-injury waivers actually harms children. There is no question but that educational and recreational opportunities for children will be restricted. Although defendant maintains that such policy decisions should be made by the Legislature and not by the court, if the court is going to intervene, then the policy reasons, in actuality, favor the validity of pre-injury waivers.

In a free society, such decisions are best left to the parent. If there is some overriding societal protection that must be implicated, then that is the job of the Legislature. Certainly, the

court should not interject its beliefs in order to dictate to parents how they should raise their children.

C. Long-Standing Michigan Law Recognizes and Upholds Pre-Injury Liability Waivers.

There is a long history in Michigan of upholding pre-injury liability waivers in a variety of contexts. Although the Court of Appeals spent pages summarizing cases from out of state, little to no mention was even given of Michigan's long-standing history and commitment to upholding the validity of pre-injury waivers.

The Court of Appeals based its decision on one sentence from this Court's opinion in *McKinstry v Valley OB-Gyn*, 428 Mich 167, 192; 405 NW2d 88 (1987). In *McKinstry*, the pregnant mother signed an arbitration agreement. The baby was born with damage. Suit was filed against the OB-Gyn alleging malpractice arising out of the prenatal care and delivery of the child. The question before this Court, in that case, is whether the arbitration agreement was binding on the malpractice claim brought on behalf of the child. It must be remembered that this Court **upheld the validity of the agreement signed by the parent**. *McKinstry*, at 192-193.

This Court in *McKinstry* also recognized that deference should be given to the contract that was agreed to by the parties. This Court stated:

> The statutory presumption provided for by the MMAA is wholly consistent with common-law principles of contract law which hold that the burden of proving nonarbitrability is assigned to the party seeking to avoid such an agreement and not to the party seeking to enforce such an agreement....Michigan law presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents....the purpose of this rule is well recognized – to preserve the integrity and stability of written instruments.

McKinstry, at 184 (authorities omitted).

Thus, the rationale of the *McKinstry* Court, as well as the holding of the *McKinstry* Court, was to uphold the enforceability of written agreements between the parties. Near the end of the opinion, however, this Court stated that "[o]ur interpretation of §5046(2) is a departure from the common law rule that a parent has no authority to waive, release or compromise claims by or against a child." *McKinstry* at 192. This Court was not analyzing the issue of whether a pre-

injury waiver would be valid in the case of a minor. This Court did not differentiate between a post-injury waiver and a pre-injury waiver. The two Court of Appeals decisions cited by this Court in support of that statement, *Schofield v Spilker*, 37 Mich 33; 194 NW2d 549 (1971) and *Reliance Ins Co v Haney*, 54 Mich App 237; 220 NW2d 728 (1974), are not on point.

The statement made by this Court in *McKinstry* was dicta. It was not necessary for the decision in the case. This Court did not thoroughly analyze the law. Although Judge Bandstra, in his concurrence, acknowledged that such a statement was not precedent, he then went on to indicate that he was "constrained to agree with the majority that this result must apply in the matter before us" (Appendix, p 30a, Judge Bandstra's concurrence), after citing this Court's decision in *McKinstry*. He further acknowledged that "***McKinstry* certainly did not consider the logic of extending the post-injury waiver invalidation rule to pre-injury waivers**." (Appendix, p 30a, Judge Bandstra's concurrence, emphasis supplied).

Defendant maintains that this Court's one sentence in *McKinstry* is not binding precedent on the issue of the validity of pre-injury waivers. It was an offhand comment made by this Court in the context of applying the arbitration statute to the facts of the case presented.

In point of fact, this Court's long recognition of the validity of freely entered into pre-injury waivers, was largely ignored by the Court of Appeals. This Court, in *Adair v State of MI*, 470 Mich 105, 127, 680 NW2d 386 (2004), held that the rule in Michigan is as follows:

> The scope of a release is controlled by the language of the release, and where, as here, the language is unambiguous, we construe it as written. *Batshon v Mar-Que Gen Contractors, Inc, 463 Mich 646, 650; 624 NW2d 903 (2001).*

Adair, at 127.

The majority opinion in the Court of Appeals cited, as authority for the proposition that a parent has no authority to waive a claim on behalf of his child, the case of *Tuer v Niedoliwka*, 92 Mich App 694; 285 NW2d 424 (1979). Although the Court cited the holding of *Tuer*, the Court did not explain the context of the holding. *Tuer* was a paternity action against a defendant who

was allegedly the father of a baby. In order to extinguish any claim for child support, the father paid to the 17 year old mother $2,000 in exchange for a release agreement in which the child forever waived any type of support obligation on the part of the father. The agreement was between the parents, not with the child. In essence, in *Tuer*, the father was attempting, by paying the 17 year old mother $2,000, to permanently relinquish any obligation he may have to that child, despite statutory law to the contrary.

The quote supplied by the Court of Appeals was invalidating such an obviously detrimental act on the part of the parents. The quote was directed to the paternity claim of the child. Clearly, in that context, such a holding makes sense, however, it has no real relevance to the issues presented in this case.

"The scope of a release is governed by the intent of the parties as it is expressed in the release." *Cole v Ladbroke Racing MI, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). "If the text of the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release." *Id.* The interpretation of a contract is a question of law that is reviewed de novo. *Old Kent Bank v Sobczak*, 243 Mich App 57, 61; 620 NW2d 663 (2000). Michigan courts have also held that it is not contrary to the public policy of this state for a party to contract against liability for damages caused by ordinary negligence. *Skotak v Vic Tanny Int'l*, 203 Mich App 616, 617-618; 513 NW2d 428 (1994); *Dombrowski v City of Omer*, 199 Mich App 705, 709; 502 NW2d 707 (1993).

As noted previously, this Court in *Wilkie*, *supra*, recognized and reinforced the fundamental principle that the courts should not intrude on freely entered into contracts between parties. This court pledged fidelity to the principle of freedom of contract. The instant case presents an even more compelling situation in which this Court should reaffirm and reinforce that such contracts will be recognized without any intrusion made by the courts.

D. The More Reasoned Decisions From Other States Uphold Such Pre-Injury Liability Waivers.

Numerous cases from other states have decided this issue. Courts in other states have held that pre-injury waivers signed on behalf of minors are valid both against a non-profit and against a for-profit business. In her brief in the Court of Appeals, the plaintiff argued that "[n]o jurisdiction upholds a pre-injury waiver, executed by a parent on behalf of his or her minor child, in favor of a for-profit business." Plaintiff-Appellant's Brief on Appeal, p viii. This is clearly a misstatement of law.

The following cases have all upheld per-injury waivers signed on behalf of minors involving a for-profit business: *Fire Ins Exch v Cincinnatti Ins Co*, 234 Wis 2d 314, 610 NW2d 98 (Wisc App 2000); *Platzer v Mammoth Mountain Ski Area*, 128 Cal Rptr 2d 885 (Cal App 3 Dist 2002) and *Brooks v Timberline Tours, Inc*, 941 F Supp 959 (D Col 1997). Thus, at the very least, the courts in Wisconsin, California and Colorado have recognized the validity of such pre-injury releases involving a for-profit defendant. In addition, there are numerous other similar decisions from other states involving defendants that appear to be non-profit. See, for example, *Hohe v San Diego Unified School Dist*, 274 Cal Rptr 647 (Cal App 4 1990); *Sharon v City of Newton*, 437 Mass 99, 109 NE 2d 738 (Mass 2002); *Zivich v Mentor Soccer Club, Inc*, 82 Ohio St 3d 367, 696 NE 2d 201, 207 (Ohio 1998) and *Kondrad v Bismark Park Dist*, 655 NW2d 411 (ND 2003).

An examination of decisions in similar cases from across the country is interesting. Defendant maintains, however, that even more important than examining what other states have done, is the examination previously made of Michigan's long-standing and well principled adherence to freedom of contract. The state of Michigan has been in the forefront of states in recognizing that courts should interpret, rather than make the law. Michigan has been in the forefront in recognizing that the ability for free citizens to enter into contracts is a bedrock principle of the United States and should not be infringed upon by the courts. Of course, these

decisions from other states are not precedentially binding. They may or may not be relevant in guiding Michigan's jurisprudence.

In Colorado, in *Cooper v Aspen Skiing Co*, 48 P3d 1229, 1232 (Colo 2002), the Court invalidated a pre-injury waiver. In response to that decision, the state of Colorado passed a statute specifically rejecting that decision. §§13-22-107, C.R.S. 2005. The Colorado Legislature, which is the proper entity to decide such issues, passed the following statute in response to the decision from the Colorado Supreme Court:

> (1)(a) The general assembly hereby finds, determines and declares it is the public policy of this state that:
>
> (I) Children of this state should have the maximum opportunity to participate in sporting, recreational, educational, and other activities where certain risks may exist;
>
> (II) Public, private, and non-profit entities providing these essential activities to children in Colorado need a measure of protection against lawsuits, and without the measure of protection these entities may be unwilling or unable to provide the activities;
>
> (III) Parents have a fundamental right and responsibility to make decisions concerning the care, custody, and control of their children. The law has long presumed that parents act in the best interest of their children.
>
> (IV) Parents make conscious choices every day on behalf of their children concerning the risks and benefits of participation in activities that may involve risk;
>
> (V) These are proper parental choices on behalf of children that should not be ignored. So long as the decision is voluntary and informed, the decision should be given the same dignity as decisions regarding schooling, medical treatment, and religious education; and
>
> (VI) **It is the intent of the general assembly to encourage the affordability and availability of youth activities in this state by permitting a parent of a child to release a prospective negligence claim of a child against certain persons and entities involved in providing the opportunity to participate in the activities**.

(b) The general assembly further declares that the Colorado supreme court's holding in Case No. 00SC885, 48 P.3d 1229 (Colo. 2002), has not been adopted by the general assembly and does not reflect the intent of the general assembly or the public policy of this state.

***

3. **A parent of a child may, on behalf of the child, release or waive the child's prospective claim for negligence.**

(Emphasis supplied).

It is interesting that the people of the state of Colorado, through their Legislature, recognized the importance of such liability waivers in providing activities and opportunities for the children of Colorado. The state of Alaska has also passed a statute specifically authorizing the parents to execute binding pre-injury waivers. Alaska Statutes §09.65.292.

This is the type of policy decision that should be made by the Legislature. The courts should not intrude on the right of the parent to make a decision for their children, absent state legislation.

Different panels of the Florida Court of Appeals have decided the issue of the validity of a pre-injury waiver involving children differently. The Supreme Court of Florida has now ruled in favor of plaintiff in the case in *Kirton v Fields*, 997 So.2d. 349 (Fla. 2008).

The Court of Appeals, in the instant case, indicated that they were "constrained" to invalidate the waiver, based upon this Court's prior holdings. In other words, without the Legislature acting on this issue, the Court of Appeals had to reluctantly follow what was perceived to be precedent from this Court. In point of fact, the Court of Appeals' decision is an example of judicial activism, since there has been no guidance from the Legislature. In the absence of guidance from the Legislature, the contract should be enforced as written. The majority of courts in other jurisdictions have invalidated such waivers. That fact, however, does not mean that those decisions were wise.

Given the policy considerations involved, this is clearly an issue for the Legislature. Reasonable people can propound arguments both for and against invalidating such waivers. Such policy arguments, however, are for the Legislature, not for this Court.

The out of state cases that reject the concept that the Court should intercede to invalidate pre-injury waivers make more sense. Such cases seem to be more in line with the jurisprudential history of Michigan. As such, the defendant urges this Court to reverse the Court of Appeals on the waiver issue and hold that pre-injury waivers signed by a parent are valid in the State of Michigan.

RELIEF REQUESTED

Defendant-Appellant KERA, LLC, d/b/a BOUNCE PARTY, respectfully requests that this Honorable Court reverse the Court of Appeals and order that summary disposition be entered on behalf of Defendant.

Respectfully Submitted,

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